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No. 02-1807

In the Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, ET AL., PETITIONERS

v.

ANN VENEMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Agriculture reasonably interpreted the statutory term "retail pet store" in the Animal Welfare Act, 7 U.S.C. 2132(f)(i), to include residential retail dog sellers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-31a) is reported at 315 F.3d 297. The opinion of the district court (Pet. App. 1a-22a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2003. A petition for rehearing was denied on March 14, 2003 (Pet. App. 32a). The petition for a writ of certiorari was filed on June 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Animal Welfare Act (AWA), 7 U.S.C. 2131 *et seq.*, requires certain dealers to obtain a license from

the Secretary of Agriculture in order to buy or sell animals. Under the AWA, the term "dealer" means:

> any person who, in commerce for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—
>
> > (i) *a retail pet store* except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
> >
> > (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year [.]

7 U.S.C. 2132(f) (emphasis added).

The AWA does not define the term "retail pet store." Pursuant to the Secretary's authority to promulgate regulations under the AWA, see 7 U.S.C. 2151, the Secretary has issued a regulation defining a "retail pet store" as "any outlet" where certain animals, including dogs, "are sold or offered for sale, at retail, for use as pets." 9 C.F.R. 1.1. Since 1971, the Secretary has interpreted the regulation to mean that the term "retail pet stores" encompasses residences from which such animals are sold as pets. 36 Fed. Reg. 24,919.

On March 25, 1997, the Secretary sought public comment on a petition for rulemaking filed by petitioners to exclude residential dog sellers from the Secretary's regulation defining a retail pet store. 62 Fed. Reg.

14,044. On July 19, 1999, the Secretary issued a decision declining to narrow the definition of a retail pet store. 64 Fed. Reg. 38,546.

2. Petitioners subsequently brought suit in the United States District Court for the District of Columbia, challenging the Secretary's decision not to amend the regulatory definition. The court held that the Secretary's interpretation of the term "retail pet store" to include residential dog sellers conflicts with the plain meaning of the provision. Pet. App. 11a-12a.*

3. The court of appeals reversed. Pet. App. 23a-31a. The court held that the AWA is ambiguous and that the Secretary permissibly interpreted the statute to exempt residential retail dog sellers from its coverage. The court of appeals explained that, although "[o]ne usually thinks of a store as a business open to the public and engaged in the sale of goods[,] * * * not all stores are open to the public and not all stores are located in shopping malls or other typical business locations." *Id.* at 25a. The court of appeals concluded that, "[w]hile the regulation's definition of 'retail pet store' does not exactly leap from the page, there is enough play in the language of the Act to preclude [the court] from saying that Congress has spoken to the issue with clarity." *Id.* at 29a.

The court of appeals also observed that, "in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of 'retail pet store' although it has amended the [A]ct three times." Pet. App. 29a. The court

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* The district court also dismissed for lack of jurisdiction petitioners' challenge to the Secretary's policy of exempting retail sellers of hunting, breeding, and security dogs from regulation under the AWA. Pet. App. 17a-20a.

concluded that "the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purpose of protecting animal welfare." *Ibid.*

ARGUMENT

1. Petitioners argue (Pet. 8-20) that the court of appeals erred in upholding the Secretary's longstanding regulation construing the phrase "retail pet store" to include residential dog sellers. The court of appeals' decision upholding the regulation, however, does not conflict with any holding of this Court or of any other court of appeals. Further review by this Court is accordingly not warranted.

Moreover, the court of appeals correctly held that the Secretary permissibly construed the term "retail pet store" to include residences from which dogs are sold at retail to ultimate consumers as pets. The Act itself exempts from the statute a "retail pet store," without defining that phrase. 7 U.S.C. 2132(f)(i). The Secretary permissibly exercised her broad rulemaking authority (see 7 U.S.C. 2151) to interpret the phrase to encompass establishments other than traditional pet stores. The word "store" is ambiguous and does not compel a meaning that is limited to commercially zoned establishments, as contended by petitioners (Pet. 17-19). As the court of appeals reasoned:

> One usually thinks of a store as a business open to the public and engaged in the sale of goods. But not all stores are open to the public and not all stores are located in shopping malls or other typical business locations. If a homeowner raised dogs; set up a separate place on his property—say, for instance, a small building; installed a counter and a cash register; displayed leashes, collars, and other dog para-

> phernalia for sale; and advertised the sale of puppies at his address, it would not be much of a stretch to view this too as a store.

Pet. App. 25a. Thus, nothing in the plain meaning of the term "retail pet store" precluded the Secretary from construing that term to include "any outlet" where certain animals, including dogs, "are sold or offered for sale, at retail, for use as pets." 9 C.F.R. 1.1. To the contrary, the Secretary's regulation conforms to the accepted definition of the term "retail store." See *Webster's Third New International Dictionary* 1938 (1993) (defining "retail store" as "a place of business usu. owned and operated by a manufacturer or by someone other than a retailer in which merchandise is sold primarily to ultimate consumers").

The Secretary's interpretation has been in effect since 1971, and Congress has not seen fit to alter that interpretation despite its willingness during that period to amend the AWA in other respects to achieve its policy goals. Pet. App. 29a. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

Contrary to petitioners' suggestion (Pet. 14-15), the Secretary's interpretation does not render superfluous the exemption in Section 2132(f)(ii) for "any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat and who derives no more than $500 gross income from the sale of other animals during

any calendar year." 7 U.S.C. 2132(f)(ii). That exemption applies to all persons falling within the terms of that provision, including those who sell at *wholesale.* By contrast, the Secretary's retail pet store regulation is limited to sellers of pets at *retail.* For similar reasons, petitioners err in relying (Pet. 15) on the reference in 7 U.S.C. 2133 to "any retail pet store or other person" to suggest that Congress distinguished between retail pet stores and retail residential sellers. The agency's regulation does not equate a retail pet store with any "person," which under the AWA includes any entity. 7 U.S.C. 2132(a). Rather, the Secretary's regulation is limited to outlets that sell pets at retail. 9 C.F.R. 1.1.

2. Petitioners also contend (Pet. 10-12, 15-16) that the Secretary's regulation undermines the AWA's purpose to protect animal welfare. The court of appeals properly found, however, that "the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purposes." Pet. App. 29a. Specifically, the Secretary concluded in her decision "that a change to the definition of 'retail pet store' would not improve animal welfare in general or [the agency's] current regulatory program." 64 Fed. Reg. at 38,547. The Secretary explained that, unlike wholesale dealers, "retail dealers, especially those who sell from their homes, are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes, as well as by breed and registry organizations." *Ibid.*

The Secretary also observed that regulation of residential sellers would require the agency to spend a disproportionate amount of resources "to regulate a very small fraction of the animals covered under [the

Secretary's] regulations," and therefore would divert the agency's resources from "those facilities that present the greatest risk of noncompliance with the regulations." 64 Fed. Reg. at 38,547. The Secretary was also reasonably influenced by the potential invasions of privacy that would result if federal inspectors began enforcing "cleaning, sanitation, handling, and other regulatory requirements in private homes." *Ibid.* The court of appeals correctly found that those policy considerations were "reasonable" and consistent with the Secretary's responsibility to administer the AWA "to fulfill the purpose of the Act as effectively as possible." Pet. App. 30a, 31a.

3. Petitioners also argue (Pet. 20-21) that the court of appeals' decision threatens to subject residential sellers of products to local laws and regulations that govern traditional commercial establishments. That contention is without merit. The court of appeals simply held that the Secretary had permissibly construed the term "retail pet store" in the AWA to encompass residential dog sellers. The court did not suggest, much less hold, that private residences from which dogs are sold must be equated with commercial establishments for other purposes. Indeed, petitioners do not argue that the panel's decision has resulted in any regulation of such private residences. Further review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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